No. 14,613

United States Court of Appeals

For the Ninth Circuit

HOMER C. MILLS,

Appellant,

vs.

UNITED STATES OF AMERICA, ex rel. Securities and Exchange Commission,

Appellee.

Appeal from the United States District Court for the District of Nevada.

REPLY BRIEF OF APPELLANT.

HOMER C. MILLS,
Searchlight, Nevada,
Appellant in Propria Persona.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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ARGUMENT.

The first point made by counsel for the Commission is that the decree of injunction issued by the trial Court in civil case No. 1000 is not subject to attack in the present proceeding, citing a number of cases to support the statement.

The position of the appellant is:—that the injunction issued by the trial Court in civil case No. 1000 was a nullity because the Court had no jurisdiction to issue it, as set forth in our opening brief on pages Nos. 6 and 7.

The correct rule is that orders made by a Court having no jurisdiction to make them may be disregarded without liability to process for contempt.

In re Sawyer, 124 U.S. 200;
In re Ayres, 123 U.S. 443;
Ex parte Fisk, 113 U.S. 713;
Ex parte Rowland, 104 U.S. 604.

As was stated in *In re Fisk,* supra:

> "When, however, a Court of the United States undertakes to punish a man for refusing to comply with an order which that Court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for contempt is equally void * * *"

As stated in our opening brief, the only jurisdiction the trial Court had in civil case No. 1000, was to enjoin the acts and practices complained of in the complaint, namely, the sending out of further circular letters by the company soliciting funds, without first filing such proposed letters with the Commission. (Opening Brief, p. 6.)

The Court exceeded its jurisdiction in going beyond the terms of the statutes above mentioned, and forever restrained the company from proceeding further under Regulation A.

On page 5 of their brief counsel for the Commission state:

> "* * * It is important to the Court to recognize that there has been no Regulation A filing other than that which the Court below, in the injunction proceedings, *held Appellant had nulli-*

*fied by his failure to file subsequent soliciting material * * *''* (Italics ours.)

Appellant is frank to say that finally the Commission has been forced to take the stand, which it did not do in any of the injunctive proceedings or in the contempt proceedings and for the first time contends that our exemption under Regulation A had been *nullified* by the failure of the company to first file soliciting material, before use of the material sent out by Searchlight Consolidated. (Italics ours.)

Nowhere in the Securities Act of 1933, as amended, is there any authority providing for a forfeiture or a nullification of an operator's right under Regulation A after it had been complied with. At that time there was no rule of the Commission providing for a forfeiture, nullification or suspension and nowhere in the decree of the trial Court in civil case No. 1000, or in its opinion, or in the contempt proceedings was a hint or finding ever made by the trial Court that Searchlight Consolidated Mining & Milling Co., had had its rights forfeited or nullified.

Counsel on page 5 of the brief of the Commission quotes from a portion of the opinion of the trial Court in support of this contention, wherein the Court found that the offer for sale * * * was not made in accordance with the terms and conditions of any exemption from registration and no such exemption was available. (Appellee's Brief, top page 5.)

The question of jurisdiction can be raised at any time. This is so elementary that citation of authority is unnecessary.

On page 11, the appellant, in his brief, in stating the procedure required by the Commission upon receipt of a letter of notification as shown in civil case No. 3, that the Commission:

> "* * * found as a fact that the enforcement of the title of the Securities Act of 1933, as amended, with respect to the securities proposed to be offered by the Corporation defendant was not 'necessary in the public interests and for the protection of the investors by reason of the small amount involved or the limited character of the public offering' and the amount did not exceed $300,000.00. With this finding, the Corporation defendant secured a valid permit to market exempted securities, and there was no manner in which this right could be taken away from it, and this must be conceded because the Commission thereafter sought to authorize it to suspend such permits, but if legal this would be retroactive as to the Corporation defendant, and could not be applied to its permit."

For the first time, on February 1, 1954, the Commission published a new rule (223) providing for suspending of a Regulation A filing, and outlined many causes for such alleged authority, and set up an elaborate procedure seeking to create for itself rights and authority, never authorized by Congress and never intended by the Securities Act of 1933, as amended. The adoption of this rule was absolutely void as being contrary of Art. I, Sec. 1 and Art. I, Sec. 8, clause 18, Constitution of the United States. This is the basis for paragraph 2 of our points and authorities cited on page 7 of our opening brief.

NO FAIRNESS OR EQUITY IN POSITION OF COMMISSION.

A bare recital of the essential facts in this case could not show a more flagrant violation of the rights and property of an individual and a corporation, as shown by the Commission in civil case No. 1000 and the subsequent contempt case.

We find from the file of civil case No. 1000 that prior to May 24, 1951, the corporation defendant had, in all respects, complied with Section 3 (b) of the Securities Act and thus had secured an unqualified right to market its securities in any legal manner it saw fit by use of the mails and other means of Interstate Commerce, but thereafter such corporation sent only to its shareholders—about 400 in number—certain letters soliciting additional investments, without first having filed with the Commission copies thereof as required by its rules, at most a mere inadvertence and technical infraction of the Commission rule.

Without any warning whatever, and with no suggestions from the Commission, that such transactions were not permitted, the Commission went to the United States District Court at Las Vegas, Nevada, and secured a temporary injunction,—not to restrain the corporation defendant from further acts and practices of a like or similar nature, but to forever bar the corporation from thereafter marketing any of its securities under Regulation A, a proceeding wholly unauthorized by the Securities Act of 1933.

Now for the first time, the Commission contends our right to comply with the rules and thereafter marketing its securities has been *nullified* and *for-*

feited because of the conduct in sending out the letters above mentioned. The trial Court could not and did not create a new law, it had only jurisdiction to restrain further violations of the acts complained of or any future acts of a like or similar nature.

The Commission was created by Congress not only to aid investors but also to aid those companies or parties financing under its provisions and its rules and regulations. Here we have an arbitrary example of what the Commission can do and is doing to destroy the operations of a company who is seeking venture capital. The company, as shown by the record, has at all times been willing to comply with any rules or regulations of the Commission, but the injunction as sought by the Commission and secured in civil case No. 1000, as construed by the Court in the contempt proceedings, and the Commission absolutely destroyed the rights of the company to proceed, all without authority of law and without any process whatever.

In our opening brief, page 7, we cited *Jones v. United States,* 298 U.S. 1, 80 L. Ed. 1015, 56 S. Ct. 654. The *Jones* case is important because it shows that the Commission cannot legislate in violation of the Federal Constitution; neither can it act in an arbitrary, capricious or unlawful manner, even though they have adopted a rule giving it such color of right.

Appellant thinks the following quotation is decisive of the issues in this case taken from *Jones v. United States,* supra.

"* * * The act contains no provision upon the subject * * * We are unable to find any precedent for the assumption of such power on the part of an administrative body, and we go to the practice and rules of the Court in order to determine by analogy the scope and limit of the power; for at least in the absence of a statute to the contrary, the power of the Commission to refuse to dismiss a proceeding on motion of the one who instituted it cannot be greater than the power which may be exercised by the judicial tribunals of the land under similar circumstances * * * (18-19)

"* * * The action of the Commission finds no support in right, principle or in law. It is wholly unreasonable and arbitrary * * * (23)

"* * * Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Justice Day—'there is no place in our Constitutional system for the exercise of arbitrary power', *Garfield v. Goldsby,* 211 U.S. 249-262. To escape assumption of such power on the part of the primary departments of the Government is not enough. Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well, and if the various administrative bureaus and Commissions necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend the powers by encroachment—even petty encroachments—upon fundamental rights, privileges and immunities of the people, we shall in

the end, while avoiding fatal consequences of a supreme autocracy, be submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of the Constitutional guarantees."

CONCLUSION.

The judgment of contempt cannot be sustained, because—

1. The trial Court had no jurisdiction in civil case No. 1000 to issue any injunction except to enjoin the acts and practices complained of, and the acts of the Court in going beyond this statute were absolutely null and void.

2. The trial Court having had no jurisdiction to make the order in the injunction matter to the extent which it did, any interested party can disregard such orders without liability of process or contempt.

3. Even if the acts complained of in the contempt matter were found to be within the prohibitive terms of the injunction, yet the undisputed facts in the contempt proceedings show that the appellant was not guilty of any of the acts charged.

4. Any facts in support of contempt proceedings must be proven beyond a reasonable doubt, and no such proof exists in the contempt proceedings, but on the contrary the facts absolve the appellant in all respects.

We submit the judgment and order should be reversed and the proceedings dismissed.

Dated, Searchlight, Nevada,
September 28, 1955.

HOMER C. MILLS,
Appellant in Propria Persona.